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IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1539

METRO TRUCK BODY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

METRO TRUCK BODY, INC., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 10, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is printed in Appendix A attached hereto, infra.

The judgment of the United States Court of Appeals for the Ninth Circuit is printed in Appendix B, hereto, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth was entered on March 10, 1980. A timely petition for rehearing was denied on February 25, 1980.

The jurisdiction of the Court is invoked under *28 USC ¶1254* and *Rule 19.1(b) of the Rules of the United States Supreme Court;* where a Court of Appeals has, in effect, by ignoring the issue presented on appeal, decided an important question of federal law which has not been, but should be, settled by this court; to wit: what standards should apply to a "true translation" of a NATIONAL LABOR RELATIONS BOARD ballot from English to Spanish and for markings in the Spanish language on the ballots counted and certified for the Union in an NLRB election. This question affects more than the parties to this action since it effects a large population of the United States who are Spanish speaking in administrative and judicial proceedings involving the use and translation of the Spanish language. At issue is the interpretation and application of *Rule 604 of Rules of Evidence for United States Courts and Magistrates,* and *Rule 604 of the Federal Rules of Evidence,* both sections requiring a "true translation."

QUESTIONS PRESENTED

1. Whether the finding of fact by the NLRB[1] that:

On September 1, 1976, a majority of employees in the appropriate unit in a secret ballot election conducted by NLRB designated the Union as their collective bargaining representative,[2] is supported by substantial evidence in the record as a whole where the record does not comply with *Rule 604 of the Federal RULES OF EVIDENCE.*

[1] NATIONAL LABOR RELATIONS BOARD is herein referred to as NLRB.

[2] Transcript of Record, Pleadings, Volume 1, page 116, herein referred to as (R. 116). References preceding a semicolon are to the NLRB findings; those following, to the evidence.

2. Whether the NLRB has conducted a fair hearing re the meaning of the 5th and 14th Amendment of the United States Constitution "due process" clause where the NLRB has denied:

(a) A hearing on the alleged charge herein of Violation of NLRA[3] Section 8(a)(5) and Section 8(a)(1), 29 U.S.C. 158(a)(5) and 29 U.S.C. 158(a)(1), and has granted summary judgment that was opposed by the company,[4] and has entered its orders that are sought to be enforced herein.

STATUTES INVOLVED

Federal Rules of Evidence, Rule 604, provides:

"An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation."

Rules of Evidence—United States Supreme Court Version, *Rule 604* provides:

"An interpreter is subject to the provisions of these rules relating to qualification as an expert and the adminstration of an oath or affirmation that he will make a true translation."

29 USC 160(3)e provides:

"The Board shall have power to petition any court of appeals of the United States, . . ., wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in Section 2112 of title 28, United States Code (28 USC § 2112). . . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

[3] NATIONAL LABOR RELATIONS ACT is herein referred to as NLRA.

[4] METRO TRUCK BODY, INC. is herein referred to as the "Company."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

"No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

1. Nature of the case

NLRB has filed an application herein pursuant to NLRA, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. 151, et seq.) The basis of the application herein is Section 10(e) of NLRA, 29 U.S.C. 160(e) for the enforcement of its orders issued against the Company on June 14, 1977 and reported at 230 NLRB Cases 28[5] (R. 111-121); infra, Appendix C.

The NLRB orders are in part based on findings of fact and conclusions of law made in a representation proceeding under Section 9 of NLRB, 29 U.S.C. 159, (NLRB Case Number 31-RC-3127), the record of said proceeding being before this Court pursuant to Section 9(d) of NLRA, 29 U.S.C. 159(d).

The United States Court of Appeals for the Ninth District had jurisdiction of this application, because the alleged unfair labor practices are alleged to have occurred at the Company's plant in Torrance, California, within this Court's jurisdiction.

2. Course of Proceedings

(a) *Representation Proceeding*

The Union filed a representation petition on March the 10, 1975 with NLRB (R. 3-4). On March 13, 1975, the Union filed a charge with NLRB alleging that the Company violated Sections 8(a)(3) and (8)(a)(1) of NLRA, 29 U.S.C.

[5] Decisions and Orders of the NLRB, Volume 230, Page 28.

138(a)(3) and 138(a)(1) when it discharged eight (8) employees because they were "illegal aliens." On April 20, 1976, the NLRB dismissed NLRB General Counsel's Complaint, which case is reported, as *Metro Truck Body, Inc.* 223 NLRB Cases 988.

In conformity with NLRB policy to delay representation proceedings until the unfair labor charges are resolved, the representation hearing pursuant to Section 9(c) of NLRA, 29 U.S.C. 159(c) was postponed until after the dismissal of the Section 8 charges; the hearing on the representation proceedings was held on July 28, 1976 (R. 5), before Hearing Officer SHERI ROSS. Decision and Direction of Election was entered on August 5, 1976 by the Regional Director pursuant to authority delegated by NLRB under Section 3(b) of NLRA, 29 U.S.C. 153(b).

The company filed its REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION on August 18, 1976 with NLRB (R. 12), which was denied on August 26, 1976 by NLRB (R. 17).

The representation election was held on September the 1st, 1976 (R. 19-20).

At that time, the Company objected to the Tally of Ballots and indicated that it would file formal Ojections to Tally of Ballots (R. 29).

The Company filed its OBJECTIONS TO TALLY OF BALLOTS AT ELECTION (R. 21) and OBJECTIONS TO ELECTION (R. 29) on September 9, 1976.

The Regional Director purusant to delegated authority (supra) entered his Supplemental Decision and Certification of Representative on September 29, 1976 (R. 47-50).

The Company filed its REQUEST FOR REVIEW OF SUPPLEMENTAL DECISION OF REGIONAL DIRECTOR AND CERTIFICATION OF REPRESENTATIVE on October 8, 1976 with NLRB (R. 51), which was denied by NLRB on November 1, 1976 (R. 60).

(b) *The Unfair Labor Practices Proceeding*

The Union filed a Charge against the Company on January 10, 1977, alleging violations of Sections 8(a)(1) and 8(a)(5) of NLRA in that the Company has failed and refused to bargain in good faith with the Union (R. 61); the Regional Director of NLRB filed his complaint thereon on February 3, 1977 (R. 62-66); the Company filed an Answer to Complaint on February 14, 1977 (R. 67).

General Counsel for NLRB filed a Motion for Summary Judgment on March 2, 1977 (R. 71); the Company filed its OBJECTIONS TO MOTION FOR SUMMARY JUDGMENT on March 31, 1977 (R. 86).

NLRB entered its Decision and Order granting Summary Judgment on June 14, 1977 (R. 111-121), which is the basis for the Application for Enforcement herein.

The Ninth Circuit Court of Appeal entered its Order For Enforcement on March 10, 1980.

3. Statement of Facts Relevant to the Issues

(a) "Majority" of the employees in a unit required for Representation Certification.

The official NLRB ballot that was used at the election had the following instructions:

"MARK AN 'X' IN THE SQUARE OF YOUR CHOICE

MARQUESE CON UNA 'X' DENTRO DEL CUADRO DE SU SELECCION

YES	NO
SI	NO

in response to the question in English and Spanish:

"Do you wish to be represented for purposes of collective bargaining by—

AUTOMOTIVE EMPLOYEES, LAUNDRY DRIVERS & HELPERS LOCAL 88, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA"[6]

(R.18).

The spanish translation for "YES" on the official ballot was "SI" namely one capital "S" and one capital "I". There were no markings placed over the "I" on the official ballot, i.e. no accent mark nor any dot. In Spanish the meaning of the word is changed by the use of a dot or an accent when writing the word (R. 24).

In the instant case, two of the ballots had written in the box under the word "YES" — "SI", the handwritten Spanish word "si" (R. 48). The hand written "si" was dotted; it was not printed in Capital Letters as set forth in the official ballot (R. 18). In Spanish, a handwritten "si" with a dot over the "i" means "if" and not "yes"; "yes" in Spanish has to be written with an accent such as "sí", (R. 24-25).

The two ballots in question were counted as Votes for the Union by BEVERLY JOHNSON, a staff member of NLRB (R. 19-20). Before the election, BEVERLY JOHNSON admitted that she did not understand Spanish (R. 26). During the counting of the ballots the Company objected to BEVERLY JOHNSON counting the two questioned ballots as affirmative ballots cast for the Union, and noted at the bottom of the official Tally of Ballots that formal objections to the Tally would be filed later (R. 19).

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[6] Herein referred to as the "Union."

The NLRB tally of votes show that:

1.	Approximate number of eligible voters	22	
2.	Void ballots	0	
3.	Votes cast for PETITIONER		13
. . . . .			
6.	Votes cast against participating labor organization(s)		9
7.	Valid votes counted		22

(R. 19).

OBJECTIONS TO TALLY OF BALLOTS AT ELECTION were filed by the Company on September 1976, (R. 21) on the following grounds:

> 1. The mark "si" in Spanish *does not mean* "yes" but rather "if" when it is written with a dot as was written in the two (2) ballots in question. . . . . .
>
> 2. The markings, "si" clearly identify the voters as Spanish Speaking, and therefore destroy the "SECRECY" of the ballot that is mandated by the NATIONAL LABOR RELATIONS ACT. (R. 21-22).

On September 29, 1976 the Regional Director of NLRB made a finding of fact in SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE that "the word "si" printed in the square designated for "yes" votes indicates a clear choice for union representation." (R. 48)

Based on said finding of fact in the representation proceeding, the NLRB concluded in the Unfair Labor Practice case that:

> "4. Since September 29, 1976 the above-named labor organization has been and now is the certified exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act."

and entered its order thereon that is sought to be enforced herein. (R. 119-120)

The Company raised the same issues in REQUEST FOR REVIEW OF SUPPLEMENTAL DECISION OF REGIONAL DIRECTOR AND CERTIFICATION OF REPRESENTATIVE (R. 51 at 53-54); and in ANSWER TO COMPLAINT (R. 67 at 68); and in OBJECTIONS TO MOTION FOR SUMMARY JUDGMENT (R. 86 at 88-90).

(c) *Denials of hearings re;*

(1) Unfair Labor Charges.

On October 8, 1976 the Company filed REQUEST FOR REVIEW OF SUPPLEMENTAL DECISION OF REGIONAL DIRECTOR AND CERTIFICATION OF REPRESENTATIVE on the grounds that:

> (1) That the regional director's decision of a *substantial factual issue* is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (2) That a *substantial question of law or policy* is raised because of, (a) the absence of, or (b) a departure from, officially reported Board precedent. (R. 51)

The text of said request clearly sets forth the *substantial factual issue* of the finding by the Regional Director of a "majority of emplo ees in the unit" as determined by the counting of the two questioned ballots that had "si" written in the "YES" box (R. 53-54).

Said Request for Review on the grounds of *substantial questions of fact and law and policy* was denied by the Board (R. 60).

On January 8, 1977 the Union filed an Unfair Labor Practice charge based on the failure of the Company to bargain (R. 61).

General Counsel for NLRB filed the complaint (R. 62) which the Company answered (R. 67) raising the same issues listed above. MOTION FOR SUMMARY JUDGMENT was granted without hearing (R. 111). The company filed its

OBJECTIONS TO MOTION FOR SUMMARY JUDGMENT setting forth the above issues and the continual refusal of the NLRB to review them. No hearing was ever granted on these issues by the Board.

REASONS FOR GRANTING THIS WRIT

1. *First Question Presented*

The question of what standards for a "True Translation" should apply to translations from the English language to other languages, such as Spanish, and from other languages, such as Spanish, to English in judicial and administrative proceedings have never been decided by this court. This issue is presented clearly and simply in this case and affects more than the parties to this proceeding. Vast portions of the population of the United States of America are now non-English speaking and need accurate translations in judicial and administrative proceedings, if those proceedings are to conform to our standards of Evidence and Due Process.

Section 10(b) of the NLRB amended provides that, so far as practicable, unfair labor practice proceedings shall be conducted in accordance with the rules of evidence applicable in the district courts of the United States.

> *Federal Rule of Evidence Section 604* provides that: "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation."

The whole election results are in question because "SI" translated has no meaning without a dot or accent mark.

The only person qualified to translate Spanish in the record of the Representation Proceeding is ANITA L. CASTELLANOS (R. 24). NLRB staff member BEVERLY JOHNSON who tallied the votes disqualified herself as a Spanish Interpreter before the election was held (R. 26).

The only evidence in the record of a "true translation under oath by a qualified interpreter is that of ANITA L. CASTELLANOS. She certified that "si" when written with a dot over the "i" means "if" and *not* "yes".

To interpret "si" otherwise is not a true translation of the Spanish word "si" which is required by ***Federal Rules*** of Evidence Section 604.

The United States Supreme Court has held that the determination of whether a majority of employees in a unit has indicated representation by a Union, be made in accordance with such *formal* (emphasis added) rules or procedure as the Board may find necessary to adopt in the sound exercise of its discretion. ***NLRB v. TOWER CO.***, 329 U.S. 324, 333, 91 L.Ed. 322, 328. To date the Board has not adopted any *formal* rules with regards to "marked ballots" nor has the Board in the present case cited us to any such *formal* rule.

2. *Second Question Presented*

(a) Substantive Due Process

The fifth amendment to the United States Constitution would seem to require that a record of evidence be without ambiguity where translations to and from the English Language are involved. More than just a resemblance to the meaning of the English must be demonstrated. It must convey the true meaning and not a similarity of meaning to be a basis for the determination of rights and duties to follow from the evidence presented to a judicial tribunal or an administrative tribunal. Without this standard of a true translation, the judicial or administrative proceeding becomes a farce.

(b) Procedural Due Process

A fair hearing is required.

"DUE PROCESS" CLAUSE OF THE 14th AMENDMENT OF THE UNITED STATES CONSTITUTION REQUIRES A FAIR HEARING WHERE THE EMPLOYER CHALLENGES THE RESULTS OF AN ELECTION.

In *NLRB v. ORTRONIX, INC.* 380 F.2d 737 (C.A. 5), the court held that an NLRB hearing is necessary and indispensible if an employer challenges the results of an election since the employer can meet his burden of showing the election was unfairly conducted only through the presentation of evidence in support of his charges.

The court stated:

> "In our view there exist numerous substantial and material issues of fact . . . which call for a formal hearing and the failure of the Board to provide one was a denial of procedural due process."

The court cited its own *UNITED STATES RUBBER COMPANY v. NLRB,* 373 F.2d 602 (C.A. 5) in support of its holding.

In *NLRB* v. *BATA SHOE CO.,* 377 F.2d 821 (C.A. 4), the court held:

> "To borrow the words of Judge Brown, writing for the Fifth Circuit, 'it is clear that Section 8(a)(5) orders which rest on crucial factual determinations, made after ex parte investigations, and without a hearing cannot stand.' *NLRB v. AIR CONTROL PRODS. of ST. PERTERSBURG, INC.,* 335 F.2d 245, 249, (C.A. 5, 1964)."

The court in the *BATA* case supra went on to define what were substantial and material factual issues raised so as to necessitate a hearing:

> "The determination however, of whether substantial and material factual issues have been raised so as to necessitate a hearing is a question of law and ultimately a question for the courts."

citing *UNITED STATES RUBBER CO. v. NLRB,* supra, *NLRB v. SUN DRUG CO.,* 359 F.2d 408, *NLRB v. IDEAL LAUNDRY & DRY CLEANING CO.,* 330 F.2d 712, *NLRB v. JOCLIN MFG. CO.,* 134 F.2d 627, and *NLRB v. POINSETT LUMBER MFG.* 221 F.2d 121.

In discussing the need for a hearing the court stated at page 826 in the *BATA* case, supra:

> "A hearing is unnecessary, therefore, where if all the facts contended for by the objecting party were credited no ground is shown which would warrant setting aside the election. *NLRB v. AIR CONTROL PRODS. OF ST. PETERSBURG, INC.,* supra; accord *NLRB v. SUN DRUG CO.,* supra; *NLRB v. WILKENING MFG. CO.,* 207 F2d 98, 100."

In the instant case, it would appear that if the contention of the Company were all credited on each of the grounds separately stated, there would be grounds for setting aside the election on each of those grounds:

FIRST: If the intent of the two persons who wrote "si" in the box for marking an "X" for the Union Representation, was to write "if" as the literal meaning of the Spanish word "si" means, and not "yes", which is written in Spanish with an accent as "sí", then under Section 9(c) of the National Labor Relations Act the union did not receive more than one vote of the majority of the votes cast as required by the National Labor Relations Act. In this case, the union would receive only 11 votes which would not be enough under the rules and statute requiring one more than majority. In this case there were 22 votes cast, and a majority would be eleven, but the Board Rules require one more, to wit: Twelve (12) votes.

SECOND The whole ballot is in question because 11 of those who were voting marked the ballot in the YES-"SI" Box. The facts show that 15 of the 22 employees voting were Spanish speaking. The ambiguity in the mistranslation of the English word "YES" leaves in doubt the intent or meaning of the employees who are spanish speaking who marked an X in the YES-"SI" box. Did they mean "yes" or did they mean "if"?

CONCLUSION

This court has never interpreted what is meant by a "true translation" by the Federal Rules of Evidence. This case presents clearly and simply the issue that effects a large minority of the population of the United States. Those who do not speak nor understand the English language. It clearly presents to the Court an opportunity to not only clarify the Federal Rules of Evidence as it effects this large minority in daily judicial and administrative proceedings but also give meaning to the due process clause of the Fifth and Fourteenth amendments where translations to and from the English language are involved in the courts and administrative agencies of the United States of America.

Respectfully submitted.

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